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A. W. Gholson Jr.

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the bailor to assume risks of loss that might occur by means other than the negligence of the bailee. The bailee is placed by the contract in the identical position as regards loss or damage due to his negligence that he would occupy in the absence of an express contract. The tenor of Article X, as a whole, does not excuse the bailee of any liability for negligence. Consequently, the dissenting opinion seems to reflect the sounder view.

J. A. WILLIAMS.

Constitutional Law—Due Process—Fixing Liability of Stockholders in Insolvent State Banks

The procedure by which the statutory liability of stockholders in insolvent banking corporations could best be enforced has been a problem in North Carolina. Prior to 1927 no assessment could be made against such stockholders until the value of the banks' assets in proportion to its debts had been ascertained.¹ This requirement often resulted in long and expensive litigation, and made it difficult in many cases for the receiver to enforce liability. To remedy this situation the legislature enacted section 13, chapter 113, Public Laws of 1927.²

This statute first came before the North Carolina Court in *Corporation Commission v. Murphey*.³ The defendant in the case was a stockholder in an insolvent bank, and had failed to pay the "levy" docketed in clerk's office of the Superior Court by the Corporation

¹ *Corporation Commission v. Merchants Bank & Trust Co.*, 193 N. C. 113, 136 S. E. 362 (1927); *Corporation Commission v. Farmers & Merchants Bank*, 192 N. C. 366, 135 S. E. 48 (1926); N. C. Cons. Stat. Ann. (1919) §239.

² "After the expiration of thirty days from the date of the filing of the notice of the taking of possession of any bank, in the office of the clerk of the Superior Court, the Corporation Commission may levy an assessment equal to the stock liability of each stockholder in the bank, and shall file a copy of such levy in the office of the clerk of the Superior Court, which shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Courts of this state; and the same shall become due and payable immediately, and if not paid execution may at the instance of the Corporation Commission issue against the stockholder delinquent, and actions on said assessments may be instituted against any non-resident stockholders in the same manner as other actions against non-residents of the state. Any stockholder may appeal to the Superior Court from the levy of assessment; the issue raised by the appeal may be determined as other actions in the Superior Court. At any time before the determination of said appeal such stockholder may petition the resident or presiding judge to relieve his property of the lien, pending the determination of the question raised by said appeal; and such relief may be granted in the discretion of the judge hearing the petition and upon such terms as he may fix." N. C. Code (Michie 1927) §218c (13).

³ 197 N. C. 42, 147 S. E. 667 (1929); affirmed 50 Sup. Ct. 161 (1930).

Commission in accordance with the statute. The defendant later entered special appearance in a proceeding by the Corporation Commission for the liquidation of the bank and moved for a judgment declaring the "levy" void and enjoining enforcement thereof, on the grounds that the statute was contrary to the due process clauses of the state⁴ and federal constitutions.⁵ The statute was held constitutional, the court construing the act of the Corporation Commission in filing the stockholder's name and the amount due on his stock with the clerk of the Superior Court to be an assessment, and that the right to trial *de novo* on appeal from the assessment to the Superior Court constituted due process of law.

The essential elements of due process of law in questions of procedure are notice and opportunity to be heard,⁶ before a tribunal having jurisdiction,⁷ at any time prior to rendition of final judgment.⁸ If these elements are present the proceedings will be declared constitutional. The due process clause does not guarantee any particular form of procedure in state tribunals, being concerned with the substance and not the form of such procedure.⁹

The statute in question¹⁰ specifically provides that the Corporation Commission "shall file a copy of such levy in the office of the clerk of the Superior Court, which * * * shall have the force and

⁴ North Carolina Constitution, Art. 1, §17.

⁵ United States Constitution, 14th Amendment.

⁶ *Drainage Commissioners v. Mitchell*, 170 N. C. 324, 87 S. E. 112 (1915); *State v. Collins*, 169 N. C. 323, 84 S. E. 1049 (1915); *City of Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1069 (1908); *Parish v. East Coast Cedar Co.*, 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718 (1903); *Rusk v. Thompson*, 170 Mo. App. 76, 156 S. W. 64 (1913); *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637 (1888); *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 (1878); *Truax v. Corrigan*, 257 U. S. 312, 332, 42 Sup. Ct. 124, 66 L. ed. 254, 27 A. L. R. 375 (1921); *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. ed. 467 (1896); *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616 (1877). "A state cannot exercise through its courts judicial jurisdiction over a person, although he is subject to the jurisdiction of the state, unless a method of notification is employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard," American Law Institute, *Restatement, Conflict of Laws* (1926) §80.

⁷ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1877); *Charles v. City of Marion*, 98 Fed. 166 (C. C. D. Ind. 1899); *Garvin v. Daussman*, *supra* note 6.

⁸ *Caldwell Land & Lumber Co. v. Smith*, 146 N. C. 199, 203, 59 S. E. 653 (1907); *Wilson v. Standefer*, 184 U. S. 399, 415, 22 Sup. Ct. 384, 46 L. ed. 612 (1902); *Gallup v. Schmidt*, 183 U. S. 300, 307, 22 Sup. Ct. 162, 46 L. ed. 207 (1902).

⁹ *Parish v. East Coast Cedar Co.*, *supra* note 6; *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 46 Sup. Ct. 384, 70 L. ed. 818 (1926); *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. ed. 1165 (1901).

¹⁰ *Supra* note 2.

effect of a judgment of the Superior Courts * * * and if not paid, execution may at the instance of the Corporation Commission issue against the stockholder." An execution is a judicial writ issuing from the court where the judgment is rendered.¹¹ Every execution presupposes a judgment of some sort, and the right given to issue the one implies the existence of the other.¹² Therefore the "levy" provided for in the statute is a judgment issuing from the Corporation Commission, a quasi-judicial body.¹³ It is not a mere assessment. The language of the legislature in the statute says that the "levy" shall be recorded as a judgment, and "shall have the force and effect of a judgment of the Superior Courts." The judgment is final¹⁴ to the extent that if the defendant does not appeal he is subject to execution¹⁵ against his property.

A total want of jurisdiction over the person or thing to be affected by a judgment renders the judgment void, and the proceedings in which it was obtained are obnoxious to the constitutional guaranty of due process of law.¹⁶ When a proceeding is strictly *in personam*, brought to determine the personal obligations of the parties, personal service within the state or a voluntary appearance in the cause is essential to the acquisition of jurisdiction.¹⁷ Where a defendant has never been served with process, nor appeared voluntarily, a judgment against him is not simply voidable, but void, and may be so treated whenever and wherever offered, without any direct proceeding to

¹¹ *Gooch v. Gregory*, 65 N. C. 142 (1871).

¹² *Sheppard v. Bland*, 87 N. C. 163, 167 (1882).

¹³ N. C. Cons. Stat. Ann. (1919) §1023.

¹⁴ "A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court," *Sanders v. May*, 173 N. C. 47, 91 S. E. 526 (1917); *Bunker v. Bunker*, 140 N. C. 18, 52 S. E. 237 (1905).

¹⁵ "An execution is the writ which directs and authorizes an officer to carry into effect the final judgment or decree of a court," *Raulerson v. Peeples*, 81 Fla. 206, 87 So. 629 (1920). "The writs of attachment and execution are essentially different, the former is issued for the purpose of seizing property and holding same in order that, if a judgment should be obtained, the property thus seized will be forthcoming to satisfy said judgment, while the latter is a writ issued for the purpose of enforcing a judgment that has been obtained," *Mount v. Trammel*, 73 Okl. 96, 175 Pac. 232 (1918).

¹⁶ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877).

¹⁷ *Johnson v. Whilden*, 166 N. C. 104, 81 S. E. 1057, Ann. Cas. 1916 C. 783 (1914), affirmed 171 N. C. 153, 88 S. E. 223, 225 (1916); *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978 (1908); *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402 (1896); *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877).

vacate it.¹⁸ The only notice given the defendant under the statute in question, before judgment was entered, was the filing of notice with the clerk of the Superior Court that the Corporation Commission had taken over the insolvent bank.¹⁹ This was not a personal service, nor was there a voluntary appearance by the defendant or his attorney.²⁰

If the interpretation placed upon the statute by the court, that the levy was an assessment only, was correct, then the decision of the court upon the constitutionality of the statute was also correct.²¹ An assessment is usually considered in the nature of a tax, to be enforced against the specific property assessed, and not enforced against the property owner personally.²² When a stockholder in a corporation is assessed on his stock and fails to pay, the proceeding is to sell the stock for the debt, and if the income from the sale does not cover the assessment, the balance is recovered by instituting a personal action against the stockholder.²³ The assessment as construed under the statute in question was not against property, but against the defendant personally, and was to be collected from his property generally by execution. There would seem to be some question as to

¹⁸ *Johnson v. Whilden*, *supra* note 17; *Condry v. Cheshire*, 88 N. C. 375 (1883); *Doyle v. Brown*, 72 N. C. 393 (1875); *Stalling v. Gully*, 48 N. C. 344 (1856).

¹⁹ See Statute, *supra* note 2.

²⁰ The question arises as to the operation of the statute on non-resident stockholders. The act provides "and actions on said assessments may be instituted against any non-resident stockholders in the same manner as other actions against non-residents of the state." A personal judgment against a non-resident rendered without personal jurisdiction over him is void. FREEMAN ON JUDGMENTS (5th ed. 1925) p. 2825. Property within the state belonging to non-residents cannot be reached and applied to the satisfaction of their creditors except by proceedings substantially *in rem*. FREEMAN ON JUDGMENTS (5th ed. 1925) p. 2839. The procedure under the statute is not explained, but it would seem to provide for notice by publication to non-resident stockholders, and an action begun in Superior Court. Such a proceeding *in personam* against a non-resident stockholder is clearly without jurisdiction, and the statute seems to apply only to attachment which was available before the act was passed.

²¹ It was admitted by the defendant's attorney on appeal to the United States Supreme Court that if the interpretation of the North Carolina Court was correct, its decision was also correct. Upon this admission the United States Court refused to hear further arguments in the case. *Raleigh (N. C.) News and Observer*, January 25, 1930, page 1, col. 4; *United States Daily*, January 27, 1930, page 11, col. 7.

²² See generally, *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 A. L. R. 330 (1892); N. C. Cons. Stat. Ann. (1919) §§2710-2717.

²³ *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654 (1897); N. C. Cons. Stat. Ann. (1919) §1165.

whether for such personal liability he had had a sufficient day in court to comply with the rule of due process.

If the levy is a judgment and therefore void, the privilege of appeal given by the statute cannot cure the defect.

A. W. GHOLSON, JR.

Contracts—Anticipatory Breach—Mailing of Letter as Test of Time and Place of Repudiation

Before the time for delivery under a contract of sale, the buyer in Kansas wrote and mailed a notice of repudiation to the seller in Ohio. *Held*: that the renunciation constituted a breach when and where the letter was posted.¹

The doctrine of anticipatory breach of contract, which is well established,² allows the aggrieved party an option of remedies,³ but there is an immediate duty to mitigate damages.⁴ Although the anticipatory breach gives rise to a present cause of action,⁵ the party in default may withdraw his repudiation, and thus revive the previous contractual relations, provided the breach has not been accepted, or has not caused the innocent party to change his position.⁶

¹ *Auglaize Box Board Co. v. Kansas City Fibre Box Co.*, 35 F (2d) 822 (C. C. A. 6th, 1929). The question of where the breach occurred was decided in order to determine where the cause of action arose so that the proper statute of limitations could be applied.

² Where a party to an executory contract repudiates his obligations before the time for performance, the opposite party may immediately sue for damages. *Hochster v. De La Tour*, 2 Ellis & Bl. 678 (1853); *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953 (1900); *Bryant v. So. Box and Lumber Co.*, 192 N. C. 607, 135 S. E. 531 (1926). *Contra*: *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384 (1874); *Carstens v. McDonald*, 38 Neb. 858, 57 N. W. 757 (1894).

³ He may bring an action for damages before performance is due, await the actual breach, or rescind the agreement. *United Press Ass'n v. National Newspaper Ass'n*, 237 Fed. 547 (C. C. A. 8th., 1916).

⁴ Although the injured party chooses to keep the contract alive, he will not be awarded damages he could have prevented, after notice of the repudiation. *Williston, Contracts* (1924) §1298; *Kingman v. Western Mfg. Co.*, 92 Fed. 486 (C. C. A. 8th., 1899); *Davis v. Bronson*, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655 (1891). *Contra*: *Roebeling's Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518 (1789); *McAlister v. Safley*, 65 Ia. 719, 23 N. W. 139 (1885); *Michael v. Hart*, [1902] 1 K. B. 482.

⁵ *Supra* note 2.

⁶ *Vold, Withdrawal of Repudiation after Anticipatory Breach of Contract* (1926) 5 TEX. L. REV. 9; *Zuck v. McClure*, 98 Pa. St. 541 (1881); *Swiger v. Hayman*, 56 W. Va. 123, 48 S. E. 839, 107 Am. St. Rep. 899 (1904); *Iowa Mausoleum Co. v. Wright*, 170 Ia. 546, 153 N. W. 94 (1915); *Independent Milling Co. v. Howe Scales Co.*, 105 Kan. 87, 181 Pac. 554 (1919).